ABDUL RAVUFF DATUK AS DAWOOD

v.

PASLA HOLDINGS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOHD SAARI YUSOF JCA
MOHD NOOR AHMAD JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: W-02-2-98]
9 MAY 2003

COMPANY LAW: *Winding-up - Petition - Appeal against dismissal of petition - Whether petitioner was denied participation in management of company - Whether substratum of company had failed - Whether there was oppressive conduct in the running of company - Companies Act 1965, s. 218(1)(i)*

The High Court dismissed the appellant's petition to wind-up the respondent company ('the company'). The appellant appealed to this court.

The issues were: (1) whether there was a quasi-partnership and the appellant was denied participation in the management of the company; (2) whether the substratum of the company had failed; and (3) whether there was oppressive conduct in the running of the company.

Held:
Per Mohd Saari Yusoff JCA

[1] On the undisputed facts there was nothing to suggest that there was an agreement or understanding that all or some of the members of the company including the appellant could participate in the conduct of the business. Applying the test in *Ebrahimi v. Westbourne Galleries* to the facts and surrounding circumstances of this case, there was no quasi-partnership. (p 470 d)

[2] It is common ground that all the oil palm and rubber estates which the company was established to operate had been sold except for the Labu Estate. As the proposed sale for the Labu Estate had not been finalised, it was premature to state that the substratum of the company had gone. Moreover, the business was on-going as reflected in the profit and loss of the company. (p 470 f-h)

[3] The notices and audited accounts for the Annual General Meeting, as evidenced by the letter in the appeal record, was sent to the appellant by post. Also, if it was true that the appellant did not receive the minutes of the said meeting, there was nothing to prevent him from requesting for the minutes to be sent to him. No such request had been made. Further, that there was unfair distribution of the proceeds of sale, the explanation given to the contrary was justified. Apart from this, the fact that no dividend was declared, did not justify an order for winding-up on that fact alone. (p 471 d-g)

[4] None of the deponents was called to give oral evidence in cross-examination. Therefore, the court confined itself to the undisputed affidavit evidence herein and found that the appellant had failed to make out a case for winding-up under s. 218(1)(i) of the Companies Act 1965. (p 472 a)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of headnotes*

Mahkamah Tinggi menolak petisyen perayu untuk penggulungan responden ('syarikat'). Maka, rayuan perayu ke mahkamah ini.

Isu-isunya adalah: (1) sama ada terdapatnya kuasi-perkongsian dan perayu dinafikan haknya untuk menyertai dalam pengurusan syarikat; (2) sama ada asas syarikat ditubuhkan itu tiada lagi; dan (3) sama ada terdapat penindasan dalam pelaksanaan syarikat.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Di atas fakta-fakta yang tidak dipertikaikan, tiada apapun yang mencadangkan bahawa terdapatnya satu perjanjian atau pemahaman bahawa semua atau sebahagian ahli-ahli syarikat termasuk pempetisyen boleh menyertai dalam pengurusan syarikat. Maka, dengan memakai ujian dalam kes *Ebrahimi v. Westbourne Galleries* kepada fakta-fakta dan keadaan kes semasa, mahkamah berpendapat bahawa tidak terdapat satu kuasi-perkongsian.

[2] Syarikat ditubuhkan untuk mengendalikan estet-estet kelapa sawit dan getah. Estet-estet tersebut dijual kecuali estet Labu. Walaupun terdapatnya cadangan bagi jualan estet Labu, cadangan tersebut belum disempurnakan lagi. Maka ianya adalah pra-masa untuk mengatakan bahawa asas syarikat ditubuhkan itu tiada lagi. Lagipun, perniagaan syarikat masih berterusan seperti dicerminkan dalam keuntungan dan kerugian syarikat.

[3] Notis dan akaun odit Mesyuarat Agong Tahunan telah pun dihantar kepada perayu melalui pos seperti terbukti oleh surat dalam rekod rayuan. Juga, jika betul bahawa minit mesyuarat tersebut tidak dihantar kepada perayu, perayu tidak dihalang meminta minit tersebut dihantar kepadanya. Perayu tidak membuat permintaan seperti tersebut. Lagipun, ketidakadilan dalam pengagihan pendapatan telahpun dijelaskan. Selain daripada itu, fakta bahawa tiada dividen diumumkan tidak mewajarkan satu perintah untuk penggulungan atas fakta itu sahaja.

[4] Tiada seorang pun deponen yang dipanggil untuk memberi keterangan lisan dalam pemeriksaan balas. Dengan itu, mahkamah terhad kepada keterangan afidavit yang tidak dipertikaikan dan mendapati bahawa perayu gagal untuk memperolehi satu perintah penggulungan di bawah s. 218(1)(i) Akta Syarikat 1965.

Rayuan ditolak.]

Case(s) referred to:
Ebrahimi v. Westborne Galleries [1873] AC 360 ***(refd)***
Re Bambi Restaurants Ltd [1963] 2 All ER 79 ***(refd)***
Re German Date Coffee Co [1882] 20 Ch D 169 ***(refd)***
Tien Ik Enterprise Sdn Bhd & Ors v. Woodsville Sdn Bhd [1995] 2 AMR 1033 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(i)

For the appellant - Hamid Sultan Abu Backer; M/s Hamid Sultan Loga Chitra & Assoc
For the respondent - D Krishna; M/s Krishna Dallumah & Co

[Appeal from High Court, Kuala Lumpur; Companies Winding-Up No: D4-28-261-97]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Saari Yusof JCA:
In the court below, the appellant ("the petitioner") applied to wind up the respondent ("the company") on the ground of just and equitable under s. 218(1)(i) of the Companies Act 1965 ("the Act"). The learned judged dismissed the petition, hence this appeal.

a The company was incorporated on 30 December 1976 by the late Datuk A.S. Dawood with the object of carrying on his rubber estate business. The authorised capital of the company was RM3 million divided into 3 million ordinary shares of RM1 each. The amount of paid-up capital or credited as paid was RM1 million. The late Datuk A.S. Dawood caused his rubber estate
b land and buildings to be transferred to the company for sale consideration of RM999,998. At the time of inception of the company, the late Datuk A.S. Dawood and Ammajee Bibi bte Daud Sha ("the first wife") were the directors of the company. The existing directors were the first wife, Abdul Rahiman bin Datuk A.S. Dawood, Noorul Hug Mohamed Ayob.

c The late Datuk A.S. Dawood caused the company to discharge the said sale consideration by way of allotment of 999,998 ordinary shares of RM1 fully paid in the share capital of the company on 26 October 1977. Such allotment was being made as follows:

d

Name of allottee	Number of shares alloted
the late Datuk A.S. Dawood	539,999
the first wife	19,999
Abdul Rahiman	20,000
e The petitioner	20,000
Other children of Datuk A.S. Dawood	400,000
	999,998

f

Following this allotment, 54% of the paid-up capital of the company was owned by the late Datuk A.S. Dawood while 46% was owned by members of his family.

g The late Datuk A.S. Dawood who died on 3 April 1989 was survived by 4 wives and 20 siblings including the petitioner. During his life time, the late Datuk A.S. Dawood and the first wife executed an agreement dated 29 July 1981 whereby the late Datuk A.S. Dawood would transfer 390,000 out of 540,000 ordinary shares to his 4 wives and siblings. Under the proposed
h arrangement, the petitioner and members of the 4th family would get additional 110,000 shares. Further, the petitioner would be appointed as a director. But the agreement was never being implemented. The members of the 4th family supported the petition, who owned shares making a total equivalent to 13% of the whole shares.

i

In this appeal, issues for determination are:

(i) whether there existed a quasi-partnership;

(ii) whether substratum of the company had failed;

(iii) whether there existed oppressive conduct in the running of the company.

On Issue (i)

In the affidavit of Rahiman dated 15 September 1997 at para. 7 and 8 (p. 45 AR) he said:

> 7. The company was Incorporated in 1976 as a private exempt company. The private exempt status of the Company enable it to make loans to its shareholders. The Late Dawood and the 1st wife were the original subscribers and directors of the company. The Company was subsequently capitalised at RM1,000,000.00 consisting of 1,000,000 ordinary shares of RM1.00 each following the injection of certain of the Late Dawood's immovable assets Into It. Consequent to this injection, the Late Dawood retained to himself 540,000 ordinary shares and distributed the balance of shares amounting to 460,000 ordinary shares amongst his children and the aforesaid wives. I state that there was no specific formula on the part of the Late Dawood in making the aforesaid distributions. This was recognised to be a matter entirely in the discretion of the late Dawood. These matters can be gathered from exhibits marked "A" and "B" annexed to Ravuff's Petition.
>
> 8. Since 1976 and up to the death of the late Dawood In 1989, the Late Dawood retained control and management of the Company to the exclusion of others save for the 1st Wife. At all material times preceeding the death of the late Dawood, the Late Dawood took no Instructions from nor did any of his children have any right to question his acts and deeds. As a matter of fact, none of his children of the said wives had ever lodged or voiced any protests or contestations against the Late Dawood in relation to his management of the Company or his affairs.

While in the affidavit of Abdul Ravuff (the petitioner) dated 23 September 1997 (p. 59 AR), at para. 3.1 he said *inter alia*:

> While it may be true that during his lifetime the late Datuk Dawood had retained control and management of the Company, he nonetheless intended that the Company, after his death, should be run as a family partnership.

From the above, it could be summed up that:

(i) petitioner was not involved in forming the company at the time of its inception;

(ii) he was never involved in the management of the company and had no control over the company;

(iii) he did not inject capital into the company. He became a contributory as a result of a gift of 20,000 shares from his father, the late Datuk A.S. Dawood, which shares was equivalent to 2% of the whole shares.

Up to the time of Datuk A.S. Dawood's death, in so far as the management of the company was concerned, it was a case of one man show. Thus, question of deadlock in the running of the company did not arise.

What was the cause of complaint by the petitioner? Under an agreement dated 29 March 1981 (p. 126 AR) ("the agreement") executed by the late Datuk A.S. Dawood and his first wife, the late Datuk A.S. Dawood was supposed to appoint the petitioner as an additional director but this was not done. By the failure of the late Datuk A.S. Dawood to implement the agreement, the petitioner was denied of being appointed as a director, thus was unable to participate in the management of the company.

It is noted that there was a lapse of eight years between the date of the agreement and the date of Datuk A.S. Dawood's death on 3 April 1989. The fact that he did nothing about the agreement, it could be inferred that he had changed his mind in appointing the petitioner as a director of the company.

The petitioner's other complaint was that the late Datuk A.S. Dawood had failed to transfer shares to all his siblings and his four wives as envisaged in the agreement. Further, the petitioner relied on Rahiman's letter dated 19 August 1996 (p. 370 AR) which acknowledged the existence of pre signed blank share transfer form.

In response, the respondent referred to contemporaneous documents namely:

(i) Directors Circular Resolution which document was signed by the late Datuk A.S. Dawood on 29 March 1989.

(ii) Annual Returns of the company starting from p. 172 in appeal record (19A).

(iii) Affidavit of Noorul Hug Mohamed Ayob who witnessed the signature of the late Datuk A.S. Dawood.

Based on documents referred to above, the contention of the respondent was that 390,000 shares were transferred to the first wife during the lifetime of the Datuk A.S. Dawood. However, the petitioner questioned the validity of the said transfer. This being an appeal from decision of winding up court, this court is not concerned with claim for beneficial ownership (see *Re Bambi Restaurants Ltd* [1963] 2 All ER 79). Thus, we express no opinion on the validity of such transfer. In any event, a suit claiming for beneficial right in the shares is pending in Syariah court. As to the law, suffice for us to refer to a passage in *Ebrahimi v. Westborne Galleries* [1873] AC 360 by Lord Wilberforce which was cited with approval in *Tien Ik Enterprises Sdn Bhd & 4 Ors v. Woodsville Sdn Bhd* [1995] 2 AMR 1033. In that case, Lord Wilberforce at p. 379 observed.

> My Lord, In my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders_agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. *It does, as equity always does, enable the court to subject the exercise of legal rights to eguitable considerations: considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.* It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is adequately and exhaustively laid down in the articles. The super imposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements:

(i) *an association formed or continued on the basis of a personal relationship, involving mutual confidence* – this element will often be found where a pre-existing partnership has been converted into a limited company;

(ii) *an agreement, or understanding,* that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business;

(iii) restriction upon the transfer of the members' interest in the company so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. It is these, and analogous factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. (emphasis added)

Based on undisputed facts, there is nothing to suggest that there was an agreement or understanding that all or some of the members of the company including the petitioner could participate in the conduct of the business. Thus, in applying the test as stated in *Ebrahimi*'s case *(supra)* to the facts and surrounding circumstances of this case, it is our finding that no quasi partnership existed in the present case.

On Issue (ii)

The objects for which the company was established were to operate timber and palm oil estates together with other objects as set out in Memorandum of Association thereof.

It is common ground that all oil palm and rubber estates had been sold except for Labu Estate.

With regard to Labu Estate, reference was made to the correspondence at p. 355, 356, 358 of the appeal record (19A). The correspondences emanated from solicitor for the prospective purchaser and reply from solicitor for the company. The tenor of the correspondences seems to indicate that there was ongoing negotiation for the purchase of Labu estate.

For the petitioner, it is submitted that based on aforesaid correspondences, the substratum of the company had gone. With greatest respect, we disagree. As the proposed sale had not been finalised, it would be premature to say that the substratum had gone. Moreover, the business was ongoing as reflected in profit and loss account of the company.

In *Re German Date Coffee Co* [1882] 20 Ch D 169 (Court of Appeal, England)

> The company was incorporated for the purpose of manufacturing a coffee substitute out of dates. In order to do this. It was the first object of the company to acquire a German patent. It turned out that the German Empire would not grant the patent to the company. It was held that the company had been set up with the aim of working a specific patent and that once that failed, the shareholders were entitled to say that they were not Interested in carrying on any other business. The company was accordingly wound up.

We agree, on the ground of failure of substratum alone, it would justify for this court to order for winding up. However, in the present case, we find that the facts and circumstances of the case did not support a case for such an order.

On Issue (iii)

Under this head, the following were the complaints by the petitioner:

(i) there was failure by the company to send notices and audited accounts for Annual General Meeting;

(ii) there was unfair distribution of proceeds of sale. There was disparity between the amount given to Rahiman and the amount given to the petitioner;

(iii) there was no dividend declared.

With regard (i), as evidenced by letter (p. 406 AR), it was sent to the petitioner by post. In the case of minutes, if it was true that the petitioner did not receive the minutes, there was nothing to prevent him from requesting for minutes to be sent to him. Here, no such request was made.

With regard (ii), it seems that the first wife opted to give her share of RM250,000 to Rahiman, which explained why Rahiman received more than the petitioner.

On (iii), in the absence of an explanation by the respondent, we accept the petitioner's version that no dividend was declared. As conceded by the learned counsel for the petitioner, based on this factor alone, it did not justify for the court to order for winding-up.

It is noted that in the present case, none of the deponents was called to give oral evidence in cross-examination or at all. That being so, for purpose of this appeal, we confine ourselves to undisputed affidavit evidence. Taking the undisputed affidavit evidence accumulatively and in the light of our finding as adumbrated above, we conclude that the petitioner had failed to make out a case for winding-up under s. 218(1)(i) of the Companies Act 1965.

Accordingly, we dismiss the appeal with cost. We order deposit to be paid to the respondent towards the account of taxed cost.